

National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 [Provisions]

Public Hearing – 25 July 2024

ANSWER TO QUESTION ON NOTICE

Department of Social Services

Topic: National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 [Provisions]

Question reference number: IQ24-000128

Question asked by: Jordon Steele-John

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Question:

Senator STEELE-JOHN: Yes—must have regard to. But it's not the same as saying that if one of the things that they must have regard to is found to have been the case—and, in this instance, failure to comply was beyond the participant's control—that does not mean that, simply because they have found that, they must therefore not revoke. The question of whether to revoke is still something which is ultimately a decision of their personal discretion.

Mr Swainson: I hear your point, Senator. From my reading of the act, and when you look at the full gamut of Commonwealth provisions which do provide delegated discretion—and whenever you have a decision-making power in an act, there must be discretion; that's the way our system of administrative law works. In my reading of those two provisions, which really bind the CEO to quite a narrow discretion, when looking at the full gamut of Commonwealth provisions, that is a reasonably tight boundary for the CEO to exercise that discretion. Where you've got a system of administrative law, there's always going to be a discretion for a delegate. That's the way our delegated system works. But, looking at the full gamut of Commonwealth legislation, that is a very tightly worded discretion. There are two musts in there, and it's a relatively narrow space in which the CEO can go outside of that.

Ms Worswick: Would it be convenient for us to take your question on notice? I think you've asked us questions about new section 30A and section 30, and for us to give you a properly consolidated answer that analyses your question—we can do that for both.

Senator STEELE-JOHN: Yes, you can take that on notice, absolutely. However, just to take Mr Swainson up on the observation of the whole gamut, my concern is deepened, because if I look at, say, the decision to revoke a participant's access due to information not being provided, that's not a reviewable decision, is it?

Ms Shannon: I think you're correct—

Senator STEELE-JOHN: Yes, it's not reviewable.

Ms Shannon: When we come back we'll cover that issue for you as well.

Senator STEELE-JOHN: I have read the section. It is not reviewable. So, despite these amendments, we are in a situation where there is a very real possibility that a situation could arise where a participant is not able to meet an information request because of something like an excessive wait time to see a specialist and the CEO could use their personal discretion to revoke the participant's status because they don't think that that is a sufficient reason. They are required to consider it, to have regard to it et cetera; they are not required under the amendments as written to, having established it on that basis and on that basis alone, cease the process of revoking access. That is correct. I can see you nodding there.

Ms Shannon: I'm nodding because I do understand your concern and I think we should come back with further advice. My understanding is that that's not how the provisions are intended

to operate. Firstly, this decision is intended to be used in unusual circumstances. But I appreciate that it is a decision with great import for an individual and that we should provide further clarity, so please let us do that. I take your point.

Senator STEELE-JOHN: Absolutely, that is fine. Can you confirm for me that there is not a section of the amendments offered, the bill or the current act which requires the CEO to halt the process of revocation of access status if the CEO determines that the failure to comply or the failure to provide that information is the result of factors beyond their control? That's not a current clause within the bill, the amendments or the act, is it?

Ms Shannon: We're just confirming, Senator.

Mr Swainson: Senator, you're asking for us to give a positive confirmation that something is not in the bill, and we're just trying to make sure that we've properly understood that what it is you're asking us to confirm is not there.

Senator STEELE-JOHN: Having read both section 30 and section 30A, there is not a clause in those sections that states that the CEO must halt the revocation of access based on the failure to comply with an information request if that information request has not been complied with because of circumstances beyond the participant's control. That clause does not exist within either 30 or 30A, does it?

Ms Shannon: Firstly, I'd just like to indicate that the decision is reviewable. We have confirmed that it's reviewable, so I apologise for the confusion there. In relation to whether or not the CEO has the ability to halt the revocation decision, we will need to come back to you on notice.

Answer:

Operation of section 30 – Revocation of participant status and new section 30A - Requirement to consider status of certain participants

- Existing subsection 30(1) of the *National Disability Insurance Act 2013* (the Act) provides that the CEO *may* revoke a person's status as a participant if they are satisfied they no longer meet the access requirements (including the residence requirements and the disability and/or early intervention requirements). This is an existing discretionary power and is not changed by the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (the Bill).
- The Bill introduces new section 30A. New subsection 30A(1) requires the CEO to consider, in circumstances that will be prescribed in NDIS rules, whether a participant continues to meet the early intervention requirements or the disability requirements. New paragraph 30A(1)(c) provides that the CEO *must* revoke a person's status as a participant if they decide that the participant does not meet the early intervention requirements or the disability requirements.
- The differences between revocation under section 30 and new section 30A are as follows:
 - Section 30 allows the CEO to consider whether a participant continues to meet the access criteria at any time, but the CEO is not required or obligated to undertake this consideration. Section 30A requires the CEO to consider whether a participant continues to meet the access criteria in specified circumstances.
 - Section 30 provides the CEO with discretion to decide whether the participant's status should be revoked. Section 30A requires the CEO to revoke the participant's status if they no longer meet the early intervention or disability criteria (i.e. there is no discretion).

Information gathering

- There is currently no ability for the CEO to request information when considering whether a participant meets the access criteria for the purpose of section 30. This

causes a range of difficulties, with decisions about a participant's ongoing access to the NDIS being based on outdated information. To remedy these difficulties, the Bill includes new subsection 30(3) which enables the CEO to request information from a participant or other person, or request that the participant undergo an examination or assessment, for the purpose of making a decision under subsection 30(1).

- New section 30A will also allow the CEO to request information, an examination or assessment in the same terms as section 30.
- Sections 30 and new section 30A both include a provision that restricts the CEO's ability to request a participant undergo an examination or assessment.
- There are no differences between the information gathering powers in section 30 and those in new section 30A.

Consequences of non-compliance with request

- Subsection 30(5) currently provides that if the CEO has requested information under subsection 30(3) and that information is not received within 90 days (or the period specified in the request if it is longer than 90 days), the CEO may revoke the participant's status. However, subsection 30(6) provides that the CEO must not revoke the participant's status if they are satisfied it was reasonable for the participant or other person not to comply with the request within the specified period. Senate amendments are proposed that will introduce a range of matters the CEO must consider in relation to whether it was reasonable for the request not to be complied with.
- New subsection 30A(7) provides that if the CEO has requested information under subsection 30(3) and that information is not received within 90 days (or the period specified in the request if it is longer than 90 days), the CEO must revoke the participant's status. However, the CEO must not revoke the participant's status if they are satisfied it was reasonable for the participant or other person not to comply with the request within the specified period. Senate amendments are proposed that will introduce a range of matters the CEO must consider in relation to whether it was reasonable for the request not to be complied with.
- The differences between the consequences of non-compliance under section 30 and new section 30A are as follows:
 - Currently, if a participant or other person does not comply with a request for information under section 30, the CEO may revoke the participant's status but is not obligated or required to. The CEO cannot revoke the participant's status if they are satisfied it was reasonable for the information request not to be complied with. This discretionary approach is consistent with the discretionary nature of section 30.
 - If a participant or other person does not comply with a request for information under new section 30A, the CEO must revoke the participant's status unless they are satisfied it was reasonable for the information request not to be complied with. This approach is consistent with the mandatory nature of new section 30A.
- Under the amendments that have been proposed, the CEO must consider a list of matters in assessing whether it is reasonable for the request not to be complied with for the purpose of both section 30 and new section 30A. It is implicit in the structure of the sections that the CEO will be satisfied it was reasonable for the request not to be complied with if the failure was outside the participant's control.
- The CEO may revoke a request for information at any time. For example, if the CEO is satisfied that it is reasonable for the relevant person not to provide the requested

information then they may choose to revoke the request which will have the effect of halting the potential revocation process.

Review rights

- Section 99 of the Act sets out the decisions that are ‘reviewable decisions’ by way of a table to subsection 99(1).
- Currently, there is only one provision under which a participant’s status can be revoked (subsection 30(1)). As such, the table to subsection 99(1) provides that a decision to revoke a person’s status as a participant made under section 30 is a reviewable decision.
- Once the Bill commences, there will be 4 separate provisions under which a participant’s status can be revoked:
 - A discretionary decision under subsection 30(1), on the basis that the person no longer meets the access requirements
 - A mandatory decision under subsection 30A(1), on the basis that the person no longer meets the access requirements
 - A discretionary decision under subsection 30(5), on the basis that the person has failed to comply with a request for information and the CEO is not satisfied that this non-compliance was reasonable
 - A mandatory decision under subsection 30A(7), on the basis that the person has failed to comply with a request for information and the CEO is not satisfied that this non-compliance was reasonable
- Item 100 of the Bill amends the table to subsection 99(1) to reflect each of the 4 decisions, ensuring all 4 decisions are reviewable.
- In conducting a review of the relevant decision, the internal reviewer (or external reviewer) will stand in the shoes of the original decision maker and make a fresh decision. If the decision under review is made under subsection 30(5) or subsection 30A(7), the reviewer will be required to consider whether it was reasonable for the participant or other person not to comply with the request as this is a necessary consideration to making the relevant decision. If the reviewer is satisfied that it was reasonable for the relevant person not to comply with the request, they will be required to set aside the decision to revoke the participant’s status (which means the participant will continue to be a participant in a scheme).